Supreme Court, U. S.
FILED
JAN 25 1979
MICHAEL RODAK, JR., CLERK

No. 78-488

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

564.54 ACRES OF LAND, MORE OR LESS, SITUATED IN MONROE AND PIKE COUNTIES, COMMONWEALTH OF PENNSYLVANIA, AND BENEDICT F. PASTORINI, ET AL., SOUTHEASTERN PENNSYLVANIA SYNOD OF THE LUTHERAN CHURCH IN AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-63a) are reported at 576 F.2d 983. The opinion of the district court denying the motion for a new trial (Pet. App. 64a-75a) is not reported. The opinion of the court of appeals on an earlier interlocutory appeal (Pet. App. 76a-87a) is reported at 506 F.2d 796.

JURISDICTION

The judgment of the court of appeals (Pet. App. 88a-89a) was entered on March 27, 1978. A timely petition for rehearing was denied on May 24, 1978 (Pet. App. 90a-91a). On August 14, 1978, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including September 21, 1978. The petition was filed on that date and was granted on November 27, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, when not-for-profit facilities owned by a church or other private entity are condemned, the proper measure of just compensation under the Fifth Amendment is the fair market value of the facilities taken, rather than the cost of providing substitute facilities.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> [N]or shall private property be taken for public use, without just compensation.

STATEMENT

A. The initial proceeding

In order to obtain land for the Tocks Island Recreation Project, the United States brought this condemnation proceeding on June 15, 1970, to acquire title to approximately 300 acres of land owned by respondent, the Southeastern Pennsylvania Synod of the Lutheran Church in America (Pet. App. 3a, 78a).[1] The condemned property consisted of three nonadjacent parcels of land along the Delaware River on which respondent operated not-for-profit summer camps for young people (Pet. App. 3a-5a, 78a).

In 1964, anticipating that its camp (as well as other property along the Delaware) would be acquired for the Tocks Island project, respondent had purchased some 3,800 acres of land in the nearby Pocono Mountains as a replacement site for its camping operations (Pet. App. 6a; Tr. 578-579). It continued, however, to use the original facilities along the Delaware through 1973 (Tr. 68). Before trial, the government offered to pay respondent $485,400 as just compensation, based on the fair market value of the land taken. Respondent rejected the offer, claiming that the cost of developing a camp at its new site would exceed $5.8 million. Accordingly, prior to trial respondent sought a ruling that the proper measure of just compensation was the cost of constructing replacement facilities at its new site, rather than the fair market value of the condemned property. Pet. App. 78a-79a.

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[1] The condemnation action was brought under the Declaration of Taking Act, ch. 307, 40 U.S.C. 258a, and Section 2 of the Act of September 1, 1965, Pub. L. No. 89-158, 79 Stat. 612, 16 U.S.C. 460o-1, which authorized the Secretary of the Army to acquire land for the Tocks Island Recreation Project (A. 8-9).

The district court rejected respondent's argument. It held that only where the condemnee is a governmental entity, which holds property in trust for the public and is obliged to replace the condemned facility, is just compensation properly measured by the cost of a substitute facility rather than by fair market value (A. 39-48).

B. The interlocutory appeal

On an interlocutory appeal under 28 U.S.C. 1292 (b), the Third Circuit reversed (Pet. App. 76a-87a). While expressing no opinion on the validity of respondent's estimate that it would cost $5.8 million to develop replacement camping facilities at the new site, the court noted that it was undisputed that the government's offer of $485,400 would be insufficient to provide the facility respondent planned (*id.* at 79a). The court framed the issue before it as follows (*ibid.*):

> Whether the Lutheran Synod operates camping facilities at a loss because it believes camping builds character, or because it feels a charitable obligation to afford recreational opportunities to persons who would not otherwise be able to afford them, it seems clear that the reason for operating the camps is related to the Synod's religious mission. Thus the question presented is the extent to which owners of single purpose facilities, operated not-for-profit for a religious or charitable purpose (and having no ready market) are entitled to be indemnified when the federal government condemns the facilities. A closely analogous case would be the condemnation of an ancient church building still in active use for religious purposes.

The court rejected the government's position that the substitute facilities measure of compensation was available only to governmental entities having a legal obligation to replace the condemned facilities, stating that such an approach "would produce the anomalous result that the federal government's fifth amendment duty of fair compensation * * * would vary according to the vagaries of local law" (*id.* at 83a). The court said it would follow instead the approach of the Court of Appeals for the Second Circuit, which held in *United States* v. *Certain Property in the Borough of Manhattan*, 403 F.2d 800, 804 (1968), that the substitute facilities measure was applicable to the condemnation of a government-owned facility "reasonably necessary for the public welfare."

The court of appeals further noted that the "taking clause" of the Fifth Amendment makes no special provision for governmental property, and observed that providing a higher measure of compensation for governmental property might encourage discriminatory condemnation of private property (Pet. App. 85a-86a). The court concluded (*id.* at 87a)

> that the substitution of facilities measure of fair compensation is available to private owners of non-profit community facilities as well as to public owners of such facilities, in appropriate cases.

The court described such cases as those in which the facilities have no ready market and are "reasonably

necessary to public welfare" (*id.* at 83a; see also *id.* at 20a-27a).[2] The court expressed no opinion on whether application of the substitute facilities test would be appropriate in this case (*id.* at 87a).

C. The trial

On remand, the trial was divided into two phases. The issue in the first phase was whether the substitute facilities measure of compensation was applicable. The district court ruled that in order to invoke the substitute facilities measure, respondent was required to establish (1) that the camps were a not-for-profit facility, (2) that they were unique, (3) that there was no ready market available, and (4) that their continued operation was reasonably necessary to the community (see Pet. App. 71a).

Respondent presented evidence that it is a not-for-profit corporation whose purpose is promoting the Christian religion according to the tenets of the Lutheran Church (A. 95). Respondent also presented evidence that it did not operate the camps on a profit-making basis but subsidized them, in one recent year contributing, together with its sister Northeastern Pennsylvania Synod, some $30,000 of the camps' operating expenses (A. 92).

Respondent's president testified that the camps provided "an educational, religious, [and] charitable experience for boys and girls of Northeastern Pennsylvania" (A. 91). The camps were open to both Lutheran and non-Lutheran children, although non-Lutheran children paid a slightly higher fee (A. 96, 113-114, 127-128). Inner-city youths and handicapped children also attended (A. 114-116). Respondent's president explained that the camps were "consistent with the purpose of the Synod" because of their effort to "communicate about the world and about creation, about the presence of God," and their "effort to talk about Christian values and as they relate in life" (A. 96-97). The camps provided classes in religion, along with nature study, arts and crafts, canoeing, gymnastics, and poetry (A. 109-110). Each camp had a chapel, and evening devotions were held in each camp (A. 120).

To establish that the camps were unique and that there was no ready market,[3] respondent presented the testimony of a consultant who stated that other camping sites along the Delaware River were difficult to find (A. 139). Although there were a number of nearby camps on the market between 1966 and 1972, there was no single camp or combination of camps

[2] Compare, however, the subsequent interpretations of the opinion by Judge Stern (*id.* at 30a-31a) and Judge Rosenn (*id.* at 44a n.1).

[3] As explained in Judge Rosenn's dissenting opinion on the second appeal (Pet. App. 46a-48a), the evidence presented by the parties on this point reflected their differing interpretations of the "no ready market" requirement. The government argued that there was a ready market for the sale of respondent's property, whereas respondent contended that there was no ready market because respondent could not purchase a comparable property at a cost roughly equal to the fair market value of the property taken. Judge Rosenn, analyzing each of the references in the district court's charge (*id.* at 47a-48a), concluded that the charge adopted respondent's theory.

available at one time that would have been comparable to respondent's three camps, which could be operated as a unit because they were located a few miles from each other and were connected by the river and public road (A. 142-143, 162-163). However, respondent's expert witness also testified that on the date of the taking the camps had a fair market value (A. 143-144), and the camp's executive director stated that the location, facilities, and other factors made these three tracts "a good camp," marketable to an interested buyer (A. 118-119).

The government's expert described 11 sales of camps between 1966 and 1972 in the county where respondent's camps were located (Tr. 263-264, 269-276). He said respondent's camping facilities were "average to above average" in comparison with the other 45 summer camps in that county, and he estimated that respondent's camps could have been sold to a ready purchaser within six months to one year (A. 142; Tr. 256-258). He also testified that there were several combinations of two or more camps sold in recent years in the county that would have been equivalent to respondent's three camps (Tr. 609-621, 652-655).

The remainder of the testimony concerned the cost of building replacement camping facilities at respondent's new 3,800-acre site in the Poconos. John Levkulic, a civil engineer, had been retained by respondent to prepare a cost estimate for a facility functionally equivalent to the camps on the Delaware (A. 145-146). He stated that in addition to replicating the

features found at the original facility, it was necessary to comply with the slightly larger cabin size required by the American Camping Association, to increase slightly the number of toilets and showers, and to comply with other health and sanitary requirements imposed by state and local governments (A. 147-148). Additional costs that respondent expected to incur at the new site included the cost of a dam to create a lake (A. 149), three beaches on the new lake (A. 149), a one-and-one-half mile access road to reach the property from the closest public road (A. 150-151), a bridge for a road over a creek to reach the other side of the projected lake (A. 151), a sewage treatment plant and electric transmission interconnecting lines (Tr. 366-367), and installation of a water system and power lines (A. 151-153). Levkulic concluded that the total cost of constructing the substitute facility, not including the $321,000 expended earlier to purchase the land, would be $4,361,633 (A. 153-154). He stated that this was a "conservative" estimate (*ibid.*).

At the close of 10 days of testimony in the first phase of the trial, the court submitted the case to the jury with three special interrogatories: (1) does the substitute facilities measure of compensation apply in this case?; if so, (2) what would be the cost of such facilities?; and (3) as of what date should the substitute facilities measure be applied? (A. 170). The jury found that the substitute facilities measure was not applicable, and accordingly did not reach the other two interrogatories (A. 171).

The second phase of the trial consisted of testimony presented by the government and respondent on the fair market value of the camps. After hearing two days of testimony, the jury returned an award of $740,000 (A. 171-172).

Respondent moved for a new trial, claiming error only with respect to the substitute facilities question in the first phase of the trial. Following reassignment of the case after the death of the original trial judge, the district court denied the motion for a new trial (Pet. App. 66a-75a). Respondent appealed for the second time.

D. The second court of appeals decision

A sharply divided panel of the Third Circuit reversed again (Pet. App. 1a-63a).[4] Judge Van Dusen, in an opinion announcing the judgment of the court and joined in part by Judge Stern, concluded that as a result of the district court's instructions and certain comments made by government counsel in summation,[5] the special interrogatory had been submitted to the jury in a confusing and misleading manner. The majority determined that even though respondent had not objected to the district court's instruction on the criteria for application of the substitute facilities measure of compensation, or to the form of the special interrogatory, reversal was required because the jury had been left " 'without adequate guidance on a fundamental question,' " and "[f]ailure to rectify this error could result in a miscarriage of justice because it could mean that the Synod would receive several million dollars less in compensation than that to which it is entitled" (*id.* at 9a).

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[4] One of the errors alleged by respondent was that the question whether the substitute facilities test applied should have been decided by the court as a matter of law instead of being given to the jury. At trial the government had argued that the question should be decided by the court, citing *United States* v. *Reynolds*, 397 U.S. 14 (1970) (Pet. App. 7a n.1). Respondent neither joined in this argument nor objected when the court ruled that the interrogatory would be submitted to the jury (*ibid.*). Because respondent had failed to challenge this ruling in the district court, the court of appeals declined to review it (Pet. App. 7a n.1).

[5] The government had argued in summation that even though respondent had not been operating its camps for monetary profit, testimony of respondent's witnesses could lead to the conclusion that the camps were operated for a "spiritual profit," in the sense of promoting the Lutheran religion or religious teachings (Pet. App. 10a-11a). The majority of the court of appeals held that these remarks misstated the law, since the court's opinion on the interlocutory appeal had referred only to profit in the monetary sense (*id.* at 11a). Moreover, since these remarks might have suggested that respondent used the camps to proselytize, and thus might have encouraged the jury to find against respondent so that taxpayers' money would not be used to build new camps where campers could be converted to the Lutheran faith, the court criticized the remarks as inaccurate and highly prejudicial (*id.* at 13a). Judge Stern, who concurred, agreed that the remarks were improper, but considered that such a line of argument was "justified—even compelled" by the court's interlocutory ruling (*id.* at 37a-38a). Judge Rosenn, who dissented, argued (*id.* at 59a n.12) that this line of argument was permissible, though it "may encounter first amendment problems at some point."

The court of appeals majority restated the holding of the earlier interlocutory appeal as follows (*ibid.*):

> In *564.54 Acres I* we held that the substitute facilities doctrine applied to privately owned property if three conditions were met: (1) the property must be operated on a not-for-profit basis; (2) there must be no ready market for the particular type of property; and (3) the property, or facilities, must be "reasonably necessary to the public welfare."

The majority found that the district court's instructions regarding two of these conditions were not entirely consistent with the interlocutory ruling. The instructions on the requirement that there be no ready market contained "no fundamental error" but were "somewhat confusing at one point," so that clarification of this condition by the court of appeals would be helpful to the district court on remand (Pet. App. 15a). The majority accordingly explained (*id.* at 18a; footnote omitted) that

> regardless of whether the Synod could have sold the camps, and regardless of whether the camps had fair market value, this condition of the substitute facilities doctrine is met if the Synod could not have replaced the camps' facilities in the market place for a cost roughly equivalent to the fair market value of the camps.

With respect to the requirement that the facility be " 'reasonably necessary to public welfare,' " the majority found that the district court's instructions had been confusing and misleading. The court explained

that to meet this condition a facility need not be entirely necessary or indispensable to the community, but need only "provide a benefit to the community that will not be as fully provided after the facility is taken" (*id.* at 26a). The court concluded that even though the district court's instruction had referred to " 'fulfilling a community need or purpose,' " it had been erroneous because it "never equated 'reasonably necessary' with community benefit," and because it seemed to require a showing of strict necessity rather than simply community benefit (*ibid.*).[6]

The majority accordingly remanded the case for a new trial pursuant to the standards explained in its opinion.

Judge Stern concurred, under compulsion of the court's earlier decision on the interlocutory appeal (*id.* at 28a-39a). He agreed that the district court's instructions were "confusing, contradictory, and, in some measure, erroneous" (*id.* at 30a). But he criticized both the earlier decision and the revised standards set forth by Judge Van Dusen. With respect to the "reasonably necessary" or "community benefit" standard in particular, he observed that "application of this standard illuminates the basic flaw in the interlocutory appeal's holding that private, non-

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[6] Restating the three conditions, Judge Van Dusen (in a portion of the opinion not joined by Judge Stern) stated the third condition solely in terms of "community benefit": "[T]he facility must have provided a benefit to the community that will not be as fully provided after the facility is taken," and noted that he had deliberately avoided use of the expression "reasonably necessary" (*id.* at 28a & n.17).

profit owners are entitled to the cost of substitute facilities measure of compensation" (Pet. App. 32a-33a).

Judge Stern pointed out that, once the substitute facilities measure of compensation is extended to condemnees that are not governmental entities, "the courts are simply in no position to insure that the compensation award will continue to be devoted to serving a community purpose or the particular community purpose which the jury has found makes the community a better place in which to live" (*id.* at 35a). He questioned, moreover, why the extension should be limited to private entities that operate on a not-for-profit basis, since profit-making facilities also provide benefits to the community (*id.* at 34a-35a). And he noted that "a windfall *necessarily* occurs upon application of the doctrine of the cost of substitute facilities," since "the condemnor is required to pay enough so that the condemnee can replace ancient, even dilapidated facilities with brand new ones," no deduction being allowed for depreciation (*id.* at 35a-36a & n.2 (emphasis in original)).

Where church-owned property is involved, Judge Stern found significant constitutional concerns. Supervision of the use of the condemnation award to ensure its devotion to substitute facilities might improperly entangle church and state, while if the condemned facilities were not replaced, the payment of a sum far in excess of fair market value might be an impermissible aid to religion (*id.* at 36a-37a). "[M]ore fundamentally," Judge Stern considered that the basic inquiry into whether a religious organization provides a "benefit" to the community "is obnoxious under our constitutional framework" (Pet. App. 37a).

Judge Rosenn dissented (*id.* at 40a-63a). He thought that the trial court's instructions were consistent with the court's opinion on the interlocutory appeal, and that any error in them was "minimal and nowhere near the magnitude of fundamental" (*id.* at 40a). He concluded that in view of the ambiguity of the court's interlocutory opinion and the novelty and uncertainty of the points at issue, the majority "exceed judicious expectations by demanding that a district judge conform to standards never before enunciated by the appellate court" (*id.* at 45a).

SUMMARY OF ARGUMENT

Measuring the "just compensation" due to certain private non-profit condemnees not by the fair market value of the property taken, but by the amount necessary for them to acquire substitute facilities, departs from the fundamental rule of eminent domain law that limits just compensation to the monetary equivalent of the property taken, and that excludes other forms of loss suffered by the condemnee from the constitutionally required award.

I.

The decisions of this Court have defined just compensation as the full monetary equivalent of the property taken, and have established the concept of "market value" as the basic measure of monetary equivalence. The market value standard was chosen

deliberately in order to strike a fair balance between the needs of the person whose property is taken and of the public who must pay the bill.

A corollary to the monetary equivalence rule is the rule that just compensation does not encompass consequential losses, such as losses that result from the owner's difficulty in finding other premises to which he can move his business. This Court has observed that consequential losses are speculative and variable, and that just compensation should not vary according to the owner's good fortune, or lack of it, in finding satisfactory premises to which he can transfer his activities. The Court has further held that just compensation does not encompass the value of the property to the owner deriving from his unique need for it.

The court of appeals, in holding that the owner of private nonprofit facilities may claim a compensation award based on the cost of substitute facilities, has abandoned these fundamental principles in favor of a doctrine that disregards the monetary equivalent of the condemned property and expressly seeks to compensate for consequential losses.

As the court of appeals recognized, the cost of substitute facilities does not measure the value of the condemned property and often greatly exceeds that value. In this case, for example, the jury found the market value of the condemned property to be $740,000, but respondent claims the cost of substitute facilities will exceed $5 million. The court of appeals nonetheless approving application of the substitute facilities doctrine to nonprofit organizations such as

respondent, regardless of whether the condemned property had a fair market value. It reasoned that fair market value would not be just compensation where it would not ensure that the condemnee could afford to continue its activities at a new site. This reasoning is inconsistent with this Court's decisions holding that the constitutional measure of just compensation does not vary with the condemnee's unique need for his particular property or with his success in finding a place to which he can move.

II.

The court of appeals sought to justify its innovation by extending a line of lower court authority that has applied the substitute facilities doctrine to the condemnation of governmentally owned property. Those decisions are based on considerations unique to public condemnees and should not be extended to condemnation of privately owned property.

The substitute facilities doctrine originated in cases involving the condemnation of certain kinds of governmentally owned property—such as bridges, streets, and sewer systems—where the market value test is unworkable because the facilities are never bought and sold in the open market. In such cases, the lower courts have concluded that the proper measure of just compensation is the amount necessary to construct a substitute for the condemned facility, since the governmental entity holds that facility in trust for the public and is under an obligation to replace it. If no replacement is shown to be necessary, the cost of

a substitute is not awarded. The substitute facilities doctrine has now been extended by the lower courts to other kinds of governmental properties—such as schools and other public buildings—for which a market value arguably can be established. But the rationale is the same: where a governmental entity holds condemned facilities in trust for the public and must provide a replacement, the cost of substitute facilities will be awarded to indemnify the community —through its trustee—for its loss.

In extending this doctrine to private condemnees, the court of appeals ignored the fundamental dichotomy in our legal system between public and private entities. An owner of private property, even if he operates the property in a way that provides a "benefit to the community," still has no legal obligation to the community at large. The community is in no sense the owner of the property. An increased award to the private owner which is justified as compensation for the public's loss thus violates the cardinal rule that just compensation is reimbursement *to the owner* for the property taken. Moreover, since a private condemnee has no duty to replace condemned facilities that provided a benefit to the community, an award in excess of the monetary equivalent of the property does not ensure continuation of the public benefit.

The court of appeals sought to avoid the critical distinctions between public and private entities by limiting its doctrine to private facilities that provide a "benefit to the community." This ambiguous standard leaves at large both identification of the relevant "community" and specification of the kinds of "benefits" that will be acceptable. It invites exceptionally free value judgments, as illustrated by the statement of the court of appeals that respondent's camps provided a benefit to "the entire community of Eastern Pennsylvania" if their admission of youths from inner-city Philadelphia helped to reduce juvenile crime (Pet. App. 26a), and by the instruction of the district court that "the furthering of a Church's religious mission may itself constitute a service to the community" (Pet. App. 55a n.10). The majority's reliance on the jury to resolve the inherent ambiguity of its standard ignores the fact that the jury's role in condemnation proceedings is limited to determining the precise amount of compensation due.

Moreover, if the test is benefit to the community, there is no principled reason for limiting the substitute facilities doctrine to nonprofit private entities as distinguished from profit-making ones. Business entities may also provide benefits to the community—as, for example, by employing youths from inner-city Philadelphia.

In any event, awarding a private condemnee the cost of substitute facilities goes beyond what is required to make the condemnee whole. Under the court of appeals' decision, the condemnee receives an award that exceeds fair market value and that is premised, not on the condemnee's own loss, but on a loss to the community that the condemnee is not legally obliged to make good. What is more, the

award will be sufficient to construct new facilities even if the condemned facilities were ancient and in disrepair, since the court of appeals rejected any deduction for depreciation.

III.

Where the condemned property belongs to a church or other religious organization, application of the substitute facilities doctrine also offends the First Amendment.

First, the court of appeals' decision requires a threshold inquiry into whether a religious facility provides a "benefit to the community." Courts in this country have no business making such an inquiry. And governments—federal, state, and local—should not be required to defend their treasuries by presenting evidence and argument to establish that a religious organization's activity does not provide a benefit to the community. The First Amendment requires the government to maintain a neutral position toward religious groups, neither favoring them nor penalizing them according to official judgments regarding the public benefits they provide.

Second, a compensation award to a religious organization based on the cost of substitute facilities is open to challenge as an impermissible aid to religion. Under the court of appeals' decision, such an award—which will in many cases greatly exceed the monetary value of the condemned property—is employed to enable private condemnees to reestablish activities found to benefit the community. Where the activity

is religious, there is a First Amendment problem. Here, respondent's camping program is in part religious, and the district court charged that the furtherance of respondent's religious mission could itself be considered a community benefit. The Establishment Clause, however, prohibits the sovereign's sponsorship, financial support, or active involvement in religious activity.

Third, since a religious organization is a private entity, it may, unlike a public entity, choose not to use its substitute facilities award to replace its condemned facilities. In this case, respondent would remain free to use its award to train missionaries, pay ministers, or serve any of its other institutional purposes. The award would thus constitute an impermissible aid to religion. *Tilton* v. *Richardson*, 403 U.S. 672, 682-684, 692 (1971). Yet any attempt to supervise or control a religious entity's use of its condemnation award to ensure continuation of the "community benefit" that produced the award would impermissibly entangle the government in the operations of a religious organization.

Finally, the availability of a substantial financial benefit for religious entities under the substitute facilities doctrine will encourage community divisions along religious lines, with supporters and opponents of particular religious groups seeking to influence governmental decisions concerning which properties should be condemned. Political division along religious lines is one of the evils that the First Amendment was designed to prevent.

ARGUMENT

I. JUST COMPENSATION UNDER THE FIFTH AMENDMENT IS THE MONETARY EQUIVALENT OF PROPERTY TAKEN FOR PUBLIC USE, NOT THE COST OF ACQUIRING OTHER FACILITIES SUITABLE FOR THE CONDEMNEE'S PURPOSE

The decision of the court of appeals that certain nonprofit condemnees are entitled to an award sufficient to acquire substitute facilities departs from the fundamental principle of eminent domain law that defines just compensation as the monetary equivalent of the property taken, and that excludes other forms of loss suffered by the condemnee from the constitutionally required award. As the court of appeals acknowledged (Pet. App. 82a), "the cost of substitute facilities in most instances will have no relationship to 'valuation' " of the condemned property. The traditional limitation of compensation to the monetary value of the condemned property reflects a carefully fixed balance between the interests of the public and those of the person whose property is condemned. The wide difference between the two measures in the instant case—where the jury found fair market value to be $740,000, and the substitute facilities claim exceeds $5 million—demonstrates vividly that turning away from this traditional limitation will produce awards far exceeding those provided under the established standards.

A. Just compensation is the monetary equivalent of a property interest taken for public use

The Fifth Amendment provides that private property may not be taken for public use "without just compensation." This Court has defined just compensation as "the full monetary equivalent of the property taken." *United States* v. *Reynolds*, 397 U.S. 14, 16 (1970); *United States* v. *Miller*, 317 U.S. 369, 373 (1943). The "guiding principle" is the indemnification of the owner of the condemned property, who " 'is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more.' " *United States* v. *Virginia Electric & Power Co.*, 365 U.S. 624, 633 (1961), quoting *Olson* v. *United States*, 292 U.S. 246, 255 (1934).

To determine monetary equivalence, this Court "early established the concept of 'market value': the owner is entitled to the fair market value of his property at the time of the taking." *Almota Farmers Elevator & Warehouse Co.* v. *United States*, 409 U.S. 470, 474 (1973), citing *New York* v. *Sage*, 239 U.S. 57, 61 (1915). Fair market value is "what a willing buyer would pay in cash to a willing seller." *United States* v. *Miller*, *supra*, 317 U.S. at 374; *New York* v. *Sage*, *supra*, 239 U.S. at 61.

The concept of "monetary 'market value' " was chosen to strike a balance between "the public's need and the claimant's loss," *United States* v. *Toronto, Hamilton & Buffalo Navigation Co.*, 338 U.S. 396,

402 (1949).[7] It is a measure " 'just' both to an owner whose property is taken and to the public that must pay the bill." *United States* v. *Commodities Trading Corp.*, 339 U.S. 121, 123 (1950). Market value "may be more or less than the owner's investment. He may have acquired the property for less than its worth or he may have paid a speculative and exorbitant price. Its value may have changed substantially while held by him. The return yielded may have been greater or less than interest, taxes and other carrying charges. The public may not by any means confiscate the benefits, or be required to bear the burden, of the owner's bargain." *Olson* v. *United States*, *supra*, 292 U.S. at 255.

When there is an active market in property of the sort condemned, market value is readily established by evidence of sales of comparable properties.[8] But when the condemned property is of a kind seldom bought and sold, "resort must be had to other data to ascertain its value." *United States* v. *Miller*, *supra*,

[7] "The law of eminent domain is fashioned out of the conflict between the people's interest in public projects and the principle of indemnity to the landowner." *United States ex rel. TVA* v. *Powelson*, 319 U.S. 266, 280 (1943). See Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1224-1226 (1967).

[8] "[I]n the valuation of readily salable articles, price at the market nearest the taking is, at least in the usual case, a practical rule of thumb, and one that is most likely to place the claimant in the pecuniary position he occupied before the taking." *United States* v. *Toronto, Hamilton & Buffalo Navigation Co.*, *supra*, 338 U.S. at 404.

317 U.S. at 374. Value may be established by evidence of the capitalization of net income from the property, or the cost to reproduce the condemned property minus depreciation. See 4 *Nichols on Eminent Domain* §§ 12.32[3][b]-12.32[3][c] (3d. ed 1977). Such evidence "may have relevance—but only, of course, as bearing on what a prospective purchaser would have paid." *United States* v. *Toronto, Hamilton & Buffalo Navigation Co.*, *supra*, 338 U.S. at 402. Even when "the property is of a kind seldom exchanged," so that "it has no 'market price' " in the sense of an actual market, value compensable under the Fifth Amendment is only the estimated value of the property to a hypothetical purchaser in a free market transaction—"only that value which is capable of transfer from owner to owner and thus of exchange for some equivalent." *Kimball Laundry Co.* v. *United States*, 338 U.S. 1, 5-6 (1949). As Mr. Justice Frankfurter explained for the Court in *Kimball Laundry* (*id.* at 5), this concept of value has been deliberately chosen as the most appropriate measure of the public's obligation:

> The value of property springs from subjective needs and attitudes; its value to the owner may therefore differ widely from its value to the taker. Most things, however, have a general demand which gives them a value transferable from one owner to another. As opposed to such personal and variant standards as value to the particular owner whose property has been taken, this transferable value has an external validity which makes it a fair measure of public obliga-

tion to compensate the loss incurred by an owner as a result of the taking of his property for public use. In view, however, of the liability of all property to condemnation for the common good, loss to the owner of nontransferable values deriving from his unique need for property or idiosyncratic attachment to it, like loss due to an exercise of the police power, is properly treated as part of the burden of common citizenship. See *Omnia Commercial Co.* v. *United States*, 261 U.S. 502, 508-09.

B. Just compensation does not include consequential damages and does not ensure that the owner will be able to purchase substitute facilities

This Court has repeatedly recognized the limitations inherent in the traditional measure of just compensation. "[T]he compensation to be paid is the value of the interest taken. Only in the sense that he is to receive such value is it true that the owner must be put in as good position pecuniarily as if his property had not been taken." *United States* v. *General Motors Corp.*, 323 U.S. 373, 379 (1945). Accordingly, "not all losses suffered by the owner are compensable under the Fifth Amendment." *United States ex rel. TVA* v. *Powelson*, 319 U.S. 266, 281 (1943).

One class of loss for which the Fifth Amendment provides no compensation is "consequential damages," which have been held to be too variable and speculative to be included as part of the constitutionally required measure of just compensation. *Mitchell* v. *United States*, 267 U.S. 341, 345 (1925); *United States* v. *Petty Motor Co.*, 327 U.S. 372, 377-378

(1946). In particular, "loss to the owner because of the difficulty of finding other premises suitably situated for the transfer of his good will * * * is denied compensation as consequential." *Kimball Laundry Co.*, *supra*, 338 U.S. at 12.[9] Compensation is denied even if a business is destroyed as a result of the taking of the land on which it was located. In *Mitchell* v. *United States*, *supra*, 267 U.S. at 345, for example, the Court concluded that the destruction of a condemnee's business, which could not be relocated because there was no other land suitable for growing and processing a special type of corn, was an "unintended incident of the taking of land" for which the Fifth Amendment provided no compensation. In *Almota Farmers*, *supra*, the Court restated that *Mitchell* had held "that the Government was not obliged to pay for business losses caused by condemnation." 409 U.S. at 476 n.2; see *id.* at 483 (Rehnquist, J., dissenting); *United States ex rel. TVA* v. *Powelson*, *supra*, 319 U.S. at 282.[10]

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[9] The temporary taking of property presents a special situation, and the condemnee's expenses in moving in and out of the property may be compensable, despite the general rule to the contrary. Compare *United States* v. *General Motors Corp.*, *supra*, 323 U.S. at 373, with *United States* v. *Westinghouse Electric & Manufacturing Co.*, 339 U.S. 261, 264-268 (1950).

[10] The structure of the Fifth Amendment itself highlights the distinction between compensation limited to the value of the property interest taken, and compensation for consequential losses the owner may have suffered. As this Court observed in *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 326 (1893):

> [J]ust compensation, it will be noticed, is for the property, and not to the owner. Every other clause in this

In the Court's opinion in *Kimball Laundry, supra*, 338 U.S. at 12, Mr. Justice Frankfurter explained the rationale of excluding consequential damages as follows:

> When a condemnor has taken fee title to a business property, there is reason for saying that the compensation due should not vary with the owner's good fortune or lack of it in finding premises suitable for the transference of going-concern value. In the usual case most of it can be transferred; in the remainder the amount of loss is so speculative that proof of it may justifiably be excluded. See *Sawyer* v. *Commonwealth*, 182 Mass. 245, 65 N.E. 52, per Holmes, C.J. By an extension of that reasoning the same result has been reached even upon the assumption that no other premises whatever were available. *Mitchell* v. *United States*, 267 U.S. 341.

The denial of compensation for consequential damages is also founded on the principle that just compensation does not encompass the value of the property to the owner deriving from his "unique need" for it or his "idiosyncratic attachment to it." *Kimball Laundry, supra*, 338 U.S. at 5. Neither the frustration of the owner's plans for the use of the property, nor his inability to carry out profitable contracts

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Fifth Amendment is personal. "No person shall be held to answer for a capital, or otherwise infamous crime," etc. Instead of continuing that form of statement, and saying that no person shall be deprived of his property without just compensation, the personal element is left out, and the "just compensation" is to be a full equivalent for the property taken.

because of the taking, is compensable. *United States ex rel. TVA* v. *Powelson, supra*, 319 U.S. at 282-284; see 4 *Nichols on Eminent Domain* § 13.33 (3d ed. 1977). As a constitutional matter, it is irrelevant that compensation for the value of the condemned property may be insufficient to enable the condemnee to purchase other property on which he can carry out his activities as satisfactorily as before the taking.

Recognizing the constitutional limits of just compensation, Congress has provided by statute for the payment of certain categories of consequential damages resulting from federal condemnations. In particular, recognizing that the need to relocate may cause hardship, Congress has enacted statutory measures designed to offset relocation expenses in specified cases. The most important of these measures is the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4601 *et seq.*, which replaced several narrower statutes providing relocation benefits or services for persons displaced when particular federal agencies acquired land.[11] The Relocation Act provides that when the federal government's acquisition of real property will

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[11] The pre-1970 statutes included the Tennessee Valley Authority Act of 1933, ch. 32, 48 Stat. 58, as amended, ch. 836, 49 Stat. 1075, 1080 (1935), which gave TVA the authority to "advise and cooperate" in the "readjustment" of persons displaced from land acquired by TVA; the Act of September 28, 1951, ch. 434, Section 501(b), 65 Stat. 364 (1951), to authorize certain construction of military and naval installations, etc., which provided for reimbursement to tenants and landowners of moving and related expenses in connection with the acquisition of properties for military use; and the Act of May 29, 1958, Pub. L. No. 85-433, Section 1, 72 Stat. 152 (43 U.S.C.

result in the displacement of any business—including any activity of a nonprofit organization (42 U.S.C. 4601(7)(C))—the owner of the displaced business is entitled to his "actual reasonable expenses in moving" his business and his "actual reasonable expenses in searching for a replacement business." 42 U.S.C. 4622(a)(1) and (3). Alternatively, the owner of a displaced business that cannot relocate "without a substantial loss of its existing patronage" may elect to accept a fixed amount, not less than $2,500 nor more than $10,000, "equal to the average annual net earnings of the business." 42 U.S.C. 4622(c).[12] The Act also provides relocation benefits for persons displaced from their place of residence as the result of a federal acquisition, including moving expenses, a dislocation allowance, and a supplement of up to $4,000 toward rent for a comparable safe and decent dwelling. 42 U.S.C. 4622, 4624(1). The legislative history of the Relocation Act reflects Congress's understanding that these statutory benefits reach losses not compensable under the Fifth Amendment. See H.R. Rep. No. 91-1656, 91st Cong., 2d Sess. 1-2 (1970).[13]

(1964 ed.) 1231 (repealed in 1971)), which provided for payment of expenses incurred as a result of acquisitions of property for the construction, maintenance, or operation of developments under the jurisdiction of the Secretary of the Interior.

[12] The owner of a business that is "part of a commercial enterprise having at least one other establishment not being acquired by the United States, which is engaged in the same or similar business" as the condemned property, may not elect this alternative measure. *Ibid.*

[13] Several states have adopted similar statutory provisions. See 4 *Nichols on Eminent Domain* § 13.3, at 13-154 to 13-161 (3d ed. 1977).

C. The cost of substitute facilities concept does not measure the monetary equivalent of the condemned property, and it permits recovery of consequential damages

In holding that the compensation due to a private condemnee may be measured by the cost of substitute facilities, the court of appeals abandoned the cardinal rule that just compensation is limited to the monetary equivalent of the condemned property in an effort to devise a measure that would encompass consequential losses.

The cost of substitute facilities is not a measure of the value of the property taken. As the court of appeals itself acknowledged (Pet. App. 82a), "the cost of substitute facilities in most instances will have no relationship to 'valuation.'" In many cases the cost of substitute facilities will greatly exceed the value of the condemned property. In this case, for example, the jury found the market value of respondent's condemned property to be $740,000, but respondent claims that the cost of constructing substitute facilities will be in excess of $5 million.[14] This wide difference results in large part from the fact that the replacement facilities will be not only newer, but more elaborate, than the condemned facilities. Whereas some of respondent's condemned buildings were constructed as early as 1937 (Tr. 70), and none later than 1955 (Pet. App. 41a), all of the buildings at the substitute site will be new. And the substitute facilities will include larger cabins, more toilets and

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[14] Pet. App. 78a-79a; cf. A. 154.

showers, a sewage treatment plant, and other improvements over the condemned facilities (see pages 8-9, *supra*).

The court of appeals sanctioned the use of the substitute facilities measure because of a fundamental misunderstanding of the function of just compensation. The court held (Pet. App. 83a) that the substitute facilities measure should be applied to private nonprofit entities because "[s]imply stated this method insures that sufficient damages will be awarded to finance a replacement for the condemned facility. Nothing less would afford just compensation." The court concluded that regardless of whether respondent could have sold the condemned camps and "regardless of whether * * * the camps had [a] fair market value," respondent (assuming that it met the court's other tests) would be entitled to the cost of substitute facilities if it "could not have replaced the [condemned] facilities in the marketplace for a cost roughly equivalent to the fair market value of the [condemned facilities]" (Pet. App. 18a). But, as we have shown, it is settled law that just compensation does not "vary with the owner's good fortune or lack of it in finding premises suitable for the transferance" of his activities (*Kimball Laundry*, *supra*, 338 U.S. at 12), and that just compensation is not increased because of the owner's "unique need" for his particular property in order to continue his chosen activities (*id.* at 5).[15]

[15] Indeed, under the court of appeals' analysis, a condemnee's entitlement to an award based on the cost of substitute facilities would vary not only according to his "good fortune or lack of it" in finding a replacement property, but according to the degree of "skill and business acumen" that reasonably could be expected of him. The court held (Pet. App. 18a & n.7) that the substitute facilities measure should be applied "if the owner, exercising reasonable diligence," could have purchased a functionally equivalent replacement at a cost roughly equal to the market value of the condemned facilities. And the court observed (*id.* at 18a n.7) that "reasonable diligence" was "a question of fact," and that "the directors of a charitable or religious organization are not necessarily expected to exercise the skill and business acumen of a profit-motivated business."

The court of appeals sought to justify its departure from the established principles of eminent domain law by extending a line of lower court authority which has applied the substitute facilities concept to condemnation of governmentally owned property. As we will now explain, these decisions do not justify abandoning the rule that a private condemnee is fully compensated by an award equivalent to the monetary value of the condemned property.

II. THE LOWER COURTS CREATED THE SUBSTITUTE FACILITIES DOCTRINE AS A NARROW EXCEPTION TO THE MONETARY EQUIVALENCE RULE IN ORDER TO MEET THE UNIQUE NEEDS OF PUBLIC CONDEMNEES; THE DOCTRINE SHOULD NOT BE EXTENDED TO PRIVATELY OWNED PROPERTY

A. The substitute facilities doctrine is based on considerations unique to public condemnees

Property owned by state and local governments is subject to the federal power of eminent domain,[16] and

[16] *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.*, 313 U.S. 508 (1941); see *United States* v. *Carmack*, 329 U.S. 230, 242 (1946).

is considered to be "private property" for which compensation must be paid under the Fifth Amendment. See, *e.g.*, *United States* v. *Game, Fish and Parks Department*, 329 F.2d 665 (8th Cir.), cert. denied, 379 U.S. 900 (1964); *Jefferson County* v. *TVA*, 146 F.2d 564 (6th Cir.), cert. denied, 324 U.S. 871 (1945); *Town of Bedford* v. *United States*, 23 F.2d 453 (1st Cir. 1927).

Although this Court has never considered the question,[17] the lower federal courts have established the substitute facilities doctrine as "an alternative method [of compensation] available in public condemnation proceedings" in order "to meet the unique needs of public condemnees." *United States* v. *Certain Property in the Borough of Manhattan*, 403 F.2d 800, 803 (2d Cir. 1968). The doctrine originated in cases involving the condemnation of certain kinds of governmentally owned properties, such as streets, highways, bridges, and sewer systems, where the traditional fair market value test is inherently unworkable because the facilities are never bought and sold in the open market. As the court explained in *Mayor and City*

[17] The court of appeals (Pet. App. 86a-87a) cited *Brown* v. *United States*, 263 U.S. 78 (1923), as "the genesis of the substitution of facilities method of measuring fair compensation." However, *Brown* did not consider the scope of just compensation under the Fifth Amendment. The question posed in *Brown* was the validity of a federal statute authorizing the government to condemn additional land adjacent to the property that would be flooded by a federal dam for the purpose of relocating a town that had been condemned for the project. The Court upheld Congress's power to authorize a taking for this purpose.

Council of Baltimore v. *United States*, 147 F.2d 786, 790 (4th Cir. 1945):

> Frequently it occurs that the taking of a street causes substantial loss for which the city must be compensated. This happens when the municipality is required to establish and improve another street in place of the one condemned or to relocate underground structures such as water mains or utility pipes. In such cases the measure of just compensation is the cost of supplying the substitute, as was held in [citations omitted]. This measure of damages is accepted because the city's property in the street has no market value, and resort must be made to other data to ascertain the value of what is taken.

See *State of Washington* v. *United States*, 214 F.2d 33 (9th Cir. 1954) (highway); *Clarksville* v. *United States*, 198 F.2d 238 (4th Cir. 1952), cert. denied, 344 U.S. 927 (1953) (sewer system); *City of Fort Worth* v. *United States*, 188 F.2d 217 (5th Cir. 1951) (street); *Woodville* v. *United States*, 152 F.2d 735 (10th Cir.), cert. denied, 328 U.S. 842 (1946) (streets, sidewalks, and alleys); *United States* v. *Des Moines County*, 148 F.2d 448 (8th Cir. 1945) (streets).

In measuring the compensation due to a public condemnee, the courts have emphasized the peculiar nature of public ownership. A public entity, unlike a private owner, "does not hold the property for its own benefit or private gain but for the public need." *United States* v. *Certain Lands in the Townships of Raritan and Woodbridge*, 246 F.2d 823, 824 (3d Cir.

1957). The distinction was stated in *Jefferson County* v. *TVA*, *supra*, 146 F.2d at 565, as follows:

> The State or its political subdivision, holds, as a trustee, title to the easement for public highways and roads. A quasi corporation such as a city or county, holds such property by delegation of the general sovereign power, the authority for its acquisition and control being governmental and the interest exclusively that of the public. Looking at the title from any viewpoint, highway easements are totally unlike property of a private corporation held for its own benefit and used for its private gain or advantage. The political subdivision cannot deal in its roads and highways as a private corporation and thus when such property is taken by the power of the Federal Government, just compensation cannot be measured by the same standards as compensation for the taking of purely private property.

As the Second Circuit explained in *United States* v. *Certain Property in the Borough of Manhattan*, *supra*, 403 F.2d at 803, the public condemnee's entitlement to the cost of acquiring a substitute for the condemned facilities flows from its obligation to provide a replacement:

> When the public condemnee proves there is a duty to replace the condemned facility, it is entitled to the cost of constructing a functionally equivalent substitute, whether that cost be more or less than the market value of the facility taken. The duty may be legally compelled or one which arises from necessity; the distinction has little practical significance in public condemnation. [Citations omitted.]

Accordingly, if replacement of the condemned property or facility is not shown to be necessary, the cost of a substitute need not be awarded:

> The true measure of compensation when a municipality's streets are condemned is the cost of providing any necessary substitutes. When no substitute facilities are necessary, it follows that no compensation is allowed. The rationale is clear. If the municipality has not had to provide substitutes, then it has suffered no financial loss and hence is not entitled to substantial damages. Indeed, the taking relieves it of the burden of maintaining such roads.

United States v. *City of New York*, 168 F.2d 387, 389-390 (2d Cir. 1948). See *United States* v. *Streets, Alleys & Public Ways*, 531 F.2d 882, 885-886 (8th Cir. 1976); *United States* v. *Certain Lands in the Townships of Raritan and Woodbridge*, *supra*, 246 F.2d at 824; *Woodville* v. *United States*, *supra*, 152 F.2d at 737; *United States* v. *Arkansas*, 164 F.2d 943 (8th Cir. 1947).

The substitute facilities concept has subsequently been extended to other kinds of governmental properties, such as schools and other public buildings. See, *e.g.*, *United States* v. *Certain Property in the Borough of Manhattan*, *supra* (public swimming and recreation center); *United States* v. *Board of Education*, 253 F.2d 760 (4th Cir. 1958) (school). Even though some form of market value arguably could be established for these properties, the cost of substitute facilities has been awarded where necessary to indemnify the public condemnee for the loss of a facility that it

will be required to replace. Thus, in the case of a public swimming and recreation center whose replacement was not statutorily required, the Second Circuit emphasized that the "duty to replace a condemned facility" could be one that "arises from necessity" as well as one that is "legally compelled." *United States* v. *Certain Property in the Borough of Manhattan*, *supra*, 403 F.2d at 803.

In sum, the rationale for awarding a public condemnee the cost of a substitute facility is that only this measure will provide full indemnity for the loss of publicly owned property that the condemnee, as trustee for the public, must replace. As the court explained in *United States* v. *Wheeler Township*, 66 F.2d 977, 984-985 (8th Cir. 1933):

> * * * we must be guided by this record as to what money loss will fall upon the township because of this condemnation. It is the duty of the township to maintain its roads and that duty can be enforced [reference to citations omitted]. The expense therefor comes from the taxpayers of the township, for whom the township is (in a sufficient sense) trustee and representative. The right of the township and its taxpayers is to maintain such roads with the lake at natural levels and "the right to exoneration from the burden of constructing and maintaining a substitute way is a valuable property right belonging to the group of taxpayers called a town." [Citation omitted.] To the extent that this burden has been increased by this taking there is a deprivation for which the law requires compensation.

B. Extending the substitute facilities doctrine to privately owned property would not indemnify the community for its loss and would go beyond what is required to make the condemnee whole

The court of appeals erred in concluding (Pet. App. 86a) that "there is no basis for distinguishing between governmental and private community uses" for purposes of measuring just compensation under the Fifth Amendment. The substitute facilities doctrine was developed for governmental entities who hold essential public facilities in trust for the public and who must replace those facilities if they are condemned. The cases developing this doctrine "to meet the unique needs of public condemnees" provide no reason or authority for applying it—rather than the standard of fair market value—to privately owned property which is not held in trust for the public and which the condemnee has no obligation to replace, even though the condemnee may be a nonprofit entity. Giving the private condemnee an award in excess of the monetary equivalent of the condemned property does not indemnify the community for its loss, but rather results in a windfall to the condemnee.

1. The owner of private property is fundamentally different from a public entity; the private owner has the right to use his property as he chooses, and he has no obligation to replace condemned facilities that may have provided a benefit to the public

Our legal system recognizes an important dichotomy between public and private entities. See, *e.g.*, *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 171-177

(1972). Accordingly, although operation of private nonprofit facilities may provide a benefit to the public, the facilities are nonetheless private and are held and operated for the benefit of the owner. The owner has no trusteeship obligation to the public at large, and the community is in no sense the owner of the property. Any benefit to the community is an incidental result of the owner's unrestricted decision to use his property in the way he chooses. As the court below observed (Pet. App. 79a):

> Whether the Lutheran Synod operates camping facilities at a loss because it believes camping builds character, or because it feels a charitable obligation to afford recreational opportunities to persons who would not otherwise be able to afford them, it seems clear that the reason for operating the camps is related to the Synod's religious mission.

The court of appeals has attempted here, however, to award a private condemnee compensation for a loss claimed to have been suffered by the community.[18] This new doctrine not only blurs the distinction between public and private entities, but also contravenes the "guiding principle of just compensation" which is "reimbursement *to the owner* for the property interest taken." *United States* v. *Virginia Electric & Power Co.*, 365 U.S. 624, 633 (1961) (emphasis added).

[18] The court of appeals stated (Pet. App. 12a n.4): "One rationale for the substitute facilities measure is to indemnify not only the owner of the condemned facilities, but those who have an interest in the continuing existence of the facilities, in this case, according to the Synod, the general public." See also Pet. App. 25a-26a, 28a, 82a-83a.

A related distinction between public and private condemnees is that the private entity has no duty—neither one which is "legally compelled or one which arises from necessity" (*United States* v. *Certain Property in the Borough of Manhattan, supra*, 403 F.2d at 803)—to replace condemned facilities that may benefit the community. Recognizing that the substitute facilities doctrine was designed for governmental condemnees having a duty to replace essential public facilities, the court of appeals in its first, interlocutory decision adopted the test, taken from public-condemnee cases, that the property or facilities must be "reasonably necessary to [the] public welfare" (Pet. App. 83a; see Pet. App. 20a). In its second decision, the majority of the court relaxed its test. The court's new rule requires only that the condemned facility "must provide a benefit to the community that will not be as fully provided after the facility is taken" (*id.* at 26a), and Judge Van Dusen further advised that the words "reasonably necessary" should be avoided (*id.* at 28a n.17).[19] The court's efforts to adapt this portion of the substitute facilities doctrine to private condemnees make the measure of compensation turn on exceptionally free value judgments defining the relevant "community" and what constitutes a "benefit" to it.

In contrast to the precisely defined constituency or community to which a governmental condemnee is by law responsible, the relevant "community" that may

[19] Judge Stern did not join this part of the opinion. See Pet. App. 39a.

receive a benefit from a private condemnee is ill defined. As the court of appeals explained (*id.* at 25a-26a), the relevant community may vary from the relatively few people who live within walking distance of a small neighborhood park to "the entire community of Eastern Pennsylvania" in this case, where respondent sought to show that its camps, by admitting youths from inner-city Philadelphia, helped to alleviate the "gang" problem and thereby reduce juvenile crime. The court of appeals offered no standards for defining the relevant community in future cases.[20]

What constitutes a "benefit" to a community is equally uncertain. The court of appeals' opinion (Pet. App. 25a) states only that in order to invoke the substitute facilities doctrine a facility must "provide a benefit to the community or be rationally related to the public welfare." As Judge Rosenn pointed out in dissent (*id.* at 54a n.9), that vague standard might cover "private nonprofit swimming clubs, ice-skating clubs, tennis clubs, and myriads of other nonprofit recreational and social organizations who might discern a need for their facilities * * *."[21] In reply, the

[20] As Judge Rosenn noted in dissent (Pet. App. 53a n.8), the community in this case could also have been defined as "the Lutheran community, the community of camping age youngsters, the Philadelphia community, or the community of the state of Pennsylvania."

[21] The district court charged, and the court of appeals indicated no disapproval, that the jury could find "that the furthering of the Church's religious mission may itself constitute a service to the community." Tr. 798; Pet. App. 55a n.10; see pages 49-50 & note 29, *infra*.

majority opinion relied on the jury as "a safeguard on the whims of the owners" of condemned property, reasoning that "since the jury is the conscience of the community, we must assume that any facility a jury finds beneficial to the community or rationally related to public welfare would not be found 'frivolous' by the community" (*id.* at 25a n.15).

But even if it is assumed that issues of this unchanneled vagueness would otherwise be appropriate for jury determination, the jury may not be relied on in condemnation cases to resolve the inherent ambiguity of the court of appeals' community benefit standard. This Court has pointed out that in condemnation proceedings the trial judge has discretion to eliminate a jury entirely, and that where a jury is employed the judge still has a role "much broader than he occupies in a conventional jury trial," being required to decide " 'all issues' other than the precise issue of the amount of compensation to be awarded." *United States* v. *Reynolds*, 397 U.S. 14, 20 (1970). And when juries are employed in condemnation proceedings, they "should not be given sophistical and abstruse formulas as the basis for their findings nor be left to apply even sensible formulas to factors that are too elusive." *Kimball Laundry Co., supra*, 338 U.S. at 20.

Moreover, if the "benefit to the community" test adopted by the court of appeals is valid, no rational basis appears for refusing to extend the substitute facilities doctrine to profit-making private entities as well as nonprofit ones. As Judge Stern pointed out (Pet. App. 34a-35a)—and as our economic system

assumes—community benefits flow from many profit-making private facilities:

> A privately owned factory enriches the community by providing jobs for its residents and monies for its tax coffers. A privately owned home benefits the community by sheltering some of its residents. A community may well be a better place in which to live if its residents have jobs, or shelter, just as it may be a better place to live if there are museums or summer camps open to its children or legitimate theatres run for profit.

The public may suffer a loss from the taking of profit-making facilities that is no less real and significant than the loss it may suffer when nonprofit facilities are taken.[22] Yet to depart from the market value measure of compensation in the case of any privately owned property that might be shown to provide a benefit to the public[23] would cast the concept of just

[22] The loss may, indeed, be quite similar. The court of appeals noted (Pet. App. 26a) that "the Synod attempted to show that the camps helped alleviate the 'gang' problem in inner-city Philadelphia" and stated that "[i]f the camps did help reduce such juvenile crime, then they provide a benefit to the entire community of Eastern Pennsylvania, not just to the campers." If a private employer's business establishment in Philadelphia is condemned, why should he not be equally entitled to the substitute facilities measure of compensation if he employed inner-city youths at the establishment and thus contributed—not only during the summer, but all year—to alleviation of the gang problem and reduction of juvenile crime?

[23] The substitute facilities doctrine might thus dictate an increased award to the owner of a residential property who conducted Girl Scout meetings in her basement or who allowed neighborhood children to swim in her swimming pool.

compensation far adrift from its traditional legal moorings.

2. *An award to a private condemnee for the cost of substitute facilities goes beyond what is required to make the condemnee whole*

Awarding the cost of substitute facilities to a private condemnee is inconsistent with the principle that the condemnee " 'must be made whole but is not entitled to more.' " *United States* v. *Virginia Electric & Power Co.*, *supra*, 365 U.S. at 633, quoting *Olson* v. *United States*, *supra*, 292 U.S. at 255. The rule adopted by the court below would go beyond what is required to make the condemnee whole.

The decision below holds that the cost of substitute facilities is to be calculated with no deduction for depreciation of the existing facilities (Pet. App. 81a-82a). As Judge Stern pointed out (*id.* at 36a), "the condemnor is required to pay enough so that the condemnee can replace ancient, even dilapidated facilities with brand new ones."[24] In denying a deduction for depreciation, the court below made the substitute facilities rule more generous for private condemnees than the Second Circuit made it for public condemnees in the case on which the court relied. *United States* v.

[24] In this case, for example, although the buildings on respondent's condemned campsites were constructed between 1937 and 1955, respondent claims the cost of constructing all new buildings at the substitute site (see pages 9, 31, *supra*).

Certain Property in the Borough of Manhattan, supra, 403 F.2d at 804 (see Pet. App. 82a-84a).[25]

The condemnee's windfall is enhanced by the inability of the courts or the community to ensure that the compensation award will be devoted to the particular community purpose that was found to justify the substitute facilities measure—or devoted to any other community purpose. A condemnee such as respondent, being a private entity, should and does remain free to employ and redirect its resources in accord with its own institutional purposes. It may, if it chooses, use its condemnation award to replace the condemned facilities and continue the same activity in them. But it has no obligation to do so, and the community has no recourse or compensable interest if the facilities are not replaced. Moreover, even if the condemnee does initially use the award to replace the facilities condemned, it has no obligation to continue that use during the useful life of the replacement facilities.[26]

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[25] The Second Circuit stated that "equitable principles undergirding just compensation require that the substitution cost be discounted by reason of the benefit which accrues to the condemnee when a new building replaces one with expired useful years." 403 F.2d at 804.

[26] The same is true of a public entity: "Modern government requires that its administrators be vested with the discretion to assess and reassess changing public needs." *United States* v. *Certain Property in the Borough of Manhattan, supra,* 403 F.2d at 803-804. The difference is that in the case of a private entity there is no legal or other requirement that the redirection of resources be in accordance with public needs, much less with the particular public need that was held to justify application of the substitute facilities doctrine.

In sum, application of the substitute facilities doctrine to private condemnees does not indemnify the community for its loss, as in the case of public condemnees, and provides more compensation than is required to make the condemnee whole.

III. THE COURT OF APPEALS' APPLICATION OF THE SUBSTITUTE FACILITIES DOCTRINE TO A RELIGIOUS ENTITY OFFENDS THE FIRST AMENDMENT

When the condemned property belongs to a church or other religious entity, application of the substitute facilities doctrine creates additional problems of a constitutional dimension. These problems include the requirement that a religious entity show that it confers a benefit on the community; the aid and advantage conferred on religion if the doctrine is made available; the difficulties of any attempt to ensure that the compensation award will be used by the entity for the community purpose that was found to justify it; and the effects on society of creating a governmental power to discriminate in favor of or against particular religious entities in making land-use decisions.

A. The central requirement adopted by the court below for a private condemnee's entitlement to the cost of substitute facilities is that the condemned facility "must provide a benefit to the community that will not be as fully provided after the facility is taken" (Pet. App. 26a). We share Judge Stern's view (Pet. App. 37a) that any judicial attempt to determine whether an activity of a religious organi-

zation provides a "benefit to the community" is "obnoxious under our constitutional framework. The judge or jury has no right to pass on the 'benefit' or the 'necessity' to the community of such installations." *Ibid.* We also agree with Judge Stern that it is inappropriate for the United States—and state and local governments as well—to be required, in defense of the public treasury, to present evidence and argument to establish that a religious organization's activity does not provide a public benefit (Pet. App. 37a-38a).[27]

The First Amendment requires the government to maintain a position of neutrality toward religious organizations. It may not favor particular organizations, nor may it "penalize or discriminate against

[27] In an attempt to fulfill this obligation, counsel for the government argued in summation at the trial that even though respondent had not been operating its camps for monetary profit, testimony of respondent's witnesses could lead to the conclusion that the camps were operated for "a spiritual profit," in the sense of promoting the Lutheran religion or its teachings (A. 166; see Pet. App. 10a-11a). The majority of the court of appeals held that these remarks were legally incorrect and improper (Pet. App. 11a-13a). Judge Stern, while he joined that holding under force of the court's earlier decision, and while he considered it "grotesque to find the United States Government making such an argument," recognized that "this argument is justified—even compelled—by [the court's earlier decision] which requires the court to determine and the government to litigate the reasonable community necessity of the thing condemned" (Pet. App. 38a). Judge Rosenn concluded that the government counsel's line of argument was permissible, though it "may encounter first amendment problems at some point" (Pet. App. 59a n.12).

individuals or groups because they hold religious views abhorrent to the authorities." *Sherbert* v. *Verner*, 374 U.S. 398, 402 (1963). See *Fowler* v. *Rhode Island*, 345 U.S. 67 (1953).

B. A compensation award to a religious entity for the cost of substitute facilities may be offensive to the First Amendment as an impermissible aid to religion. As we have noted, the cost of substitute facilities does not measure, and may greatly exceed, the monetary value of the property taken. The court of appeals concluded that the substitute facilities doctrine should nonetheless be employed in order to enable private condemnees to relocate and reestablish activities that provide a benefit to the community (Pet. App. 82a-83a). In this case, the camping activities in question are, in part, explicitly religious.[28] Moreover, the district court instructed the jury—and the court of appeals did not disagree—that "the furthering of the Church's religious mission may itself constitute a service to the community" (Tr. 798; see

[28] As Judge Stern pointed out, each of the three camps included a chapel; cabin devotions were part of the camp day; and religious classes were part of the camping program (Pet. App. 38a; A. 120). Moreover, the camps were run by Lutheran clergymen; Lutheran children were given a slight price advantage; and the camps were operated by respondent in accordance with its articles of incorporation which provide that "'[t]he purpose of the corporation is to promote the Christian religion according to the tenets of faith as set forth in the Laws of the Lutheran Church of America'" (Pet. App. 38a; A. 95).

Pet. App. 55a n.10).[29] And the court of appeals did not flinch from the "closely analogous case" of "the condemnation of an ancient church building still in active use for religious purposes" (Pet. App. 79a).

The court of appeals has thus authorized an award which is increased above market value for the express purpose of permitting a religious entity to continue activities that are part of its religious mission. Further, the award takes no account of depreciation in the existing facilities, and thus finances the replacement of old facilities with new ones. Such an award seems inconsistent with the prohibition of the Establishment Clause against "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Committee for Public Education* v. *Nyquist*, 413 U.S. 756, 772 (1973), quoting *Walz* v. *Tax Commission*, 397 U.S. 664 (1970); *Levitt* v. *Committee for Public Education*, 413 U.S. 472 (1973).

On the other hand, if respondent obtains an award under the substitute facilities measure and does not use it to construct replacement camping facilities, respondent will receive a windfall from the government without restoring the community benefit on which the award was premised. Yet, unlike a public condemnee, respondent is free to do as it wishes

[29] "In determining whether or not the condemned facilities provided a reasonably necessary service to the community, you may consider that the camps were owned and operated by the Lutheran Church, and that the furthering of the Church's religious mission may itself constitute a service to the community" (Tr. 798; Pet. App. 55a n.10).

with its award. If it obtains the $4 or $5 million that it claims, it may use that money to train missionaries, pay Lutheran ministers, enhance its endowment, or serve any of its other institutional purposes. Even if respondent does use the award to construct replacement camping facilities, it need not use those facilities as camps indefinitely, but would be free to convert them into seminaries, religious conference centers, training facilities for missionaries, or any other religious uses.

In *Tilton* v. *Richardson*, 403 U.S. 672 (1971), this Court held invalid under the First Amendment a part of a federal statute providing construction grants for college and university facilities. The eligible recipients included church-related colleges and universities, provided that the facilities were used for defined secular purposes. However, this prohibition on religious use of the facilities was limited to a 20-year period. The Court held the law invalid insofar as the prohibition was limited to 20 years. *Id.* at 682-684 (Burger, C.J.); *id.* at 692 (Douglas, J.). As the Chief Justice explained: "If, at the end of 20 years, the building is, for example, converted into a chapel or otherwise used to promote religious interests, the original federal grant will in part have the effect of advancing religion." *Id.* at 683 (Burger, C.J.). That decision governs here. For application of the substitute facilities doctrine would support respondent's religious activities, whether in the form of replacement camps or in any other form to which respondent might freely decide to devote the compensation award.

C. Any attempt by the government or the courts to supervise or control respondent's use of its award would be at least equally objectionable. Any effort to require respondent to devote its award to replacing the condemned property with mixed-religion camps providing the same community benefit that a jury had found to exist—and requiring it to continue the operation of the new camps on the same basis—would entangle the government in the supervision of respondent's operations. The government could become embroiled in questions such as what action should be taken if applications from inner-city youths decline or if respondent should decide to drop or reduce the inner-city admissions, or whether respondent could properly reduce the time spent on nature study and increase the number of religious activities, or whether respondent could increase the price advantage given to Lutheran campers or vary the religious makeup of the camps.[30]

[30] Indeed, since under the district court's instructions the jury would be permitted to find that a church's "religious mission" constituted a benefit to the community (see page 50 note 29, *supra*), the obligation to ensure that the condemnee used its award in such a way as to continue this benefit could require the government to determine whether the church's activities were consistent with that "mission." The First Amendment proscribes any governmental effort to define the proper scope of a church's religious mission, and the courts may not resolve doctrinal religious disputes. See *Presbyterian Church* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94 (1952). Cf. *New York* v. *Cathedral Academy*, 434 U.S. 125, 133 (1977) ("The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment * * *.").

The First Amendment forbids "comprehensive, discriminating, and continuing state surveillance" which "involve[s] excessive and enduring entanglement between state and church." *Lemon* v. *Kurtzman*, 403 U.S. 602, 619 (1971). See *Walz* v. *Tax Commission*, *supra*, 397 U.S. at 674-675.

D. Finally, the availability of a substantial financial benefit for religious entities under the substitute facilities doctrine may encourage community divisions along religious lines. Consideration of conferring such a benefit could influence a government's determination of whether a particular property should be condemned. The potential would arise for discrimination in favor of or against particular religious organizations, and supporters and opponents of a particular organization might be pitted against each other in attempts to influence the governmental decision (particularly if controversial or unconventional religious organizations are involved). Once the property is condemned, these divisions may be exacerbated by the attempt of the judge or jury to determine whether the condemned facility provided a "community benefit" entitling the religious organization to a substantially higher measure of compensation. This kind of "political division along religious lines" is "one of the principal evils against which the First Amendment was intended to protect." *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 622.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JANUARY 1979

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 285671 297